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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1362 121

MANHATTAN LIGHTERAGE CORPORATION,

Petitioner,

—against—

ERNEST ANDERSON, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Statement

Respondents brought this action under Section 16 (b) f the Fair Labor Standards Act of 1938 to recover npaid overtime compensation due them pursuant to ection 7 of the Act. Petitioner, after having taken he depositions of some of the respondents, moved for ummary judgment on the ground that the respondents ere seamen within Section 13 (a) (3) and therefore ere not subject to overtime provisions of Section 7. he motion for summary judgment was accompanied by

the affidavit of Harry C. Shanks, president of the petitioner (R., 20). The respondents, among whom was Ernest Anderson, filed affidavits in opposition to the motion for summary judgment. (See stipulation in the printed Record on Appeal permitting the parties to incorporate in their briefs any portion of the data which was submitted on the motion for summary judgment.) In view of the fact that all of the affidavits of the respondents submitted in opposition were similar, one affidavit, namely, that of Ernest Anderson, was set forth in full in the brief of the respondents before the Circuit Court of Appeals and appears in full in this brief on pages 5 to 8 inclusive.

POINT I.

This Court has held the term "seamen" to apply to those persons who aid in the navigation of a vessel.

The work performed by the respondents was not in aid of navigation but concerned the loading and unloading of lighters and was comparable to work performed by longshoremen or harbor workers.

This Court has held that the nature of the work performed will determine the status of the person employed. If the work is in aid of navigating the vessel, the employee is classified as a "seaman". If the tasks performed concern loading and unloading or other work not in aid of navigation, he is classified as a "harbor worker" comparable to the work performed by a longshoreman.

Counsel for petitioner have set forth in their brief many definitions of the term "seamen". They have gone far afield to sustain their position. We are not concerned with definitions of this term when other statutes were interpreted.

We are here concerned with the interpretation of the Fair Labor Standards Act of 1938 and the intention of the law makers who passed that Act. As was said by this Court in *Warner* v. *Gottra*, 293 U. S. 155, 158:

> "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."

In passing upon the Act here involved, this Court said (*Phillops Inc.* v. *Walling*, decided March 26, 1944):

> "Exemptions from this humanitarian and remedial legislation are to be narrowly construed and to extend them to persons other than those clearly within the terms and spirit of the act is to abuse the interpretative process and to frustrate the announced will of the people."

It will be recalled that Mr. Justice Holmes said (*Towne* v. *Eisner*, 245 U. S. 418, 425):

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Counsel for petitioner refer to *International Stevedor-*

ing Co. v. *Haverty,* 272 U. S. 50, as authority for their position that a longshoreman in the broad sense may be considered a seaman. As a matter of fact, longshoremen are not seamen, but harbor workers. No one up to this time has challenged their right to receive the benefits of the Fair Labor Standards Act. It is fair to state that the *Haverty* decision can in no way affect the issues in this matter because the Court in that case was careful to point out:

> "It is true that for most purposes as the word is commonly used stevedores are not seamen."

However, whatever confusion existed as to the interpretation of the decision in the *Haverty* case, it was subsequently cleared up by this Court in the case of *Warner* v. *Goltra,* 293 U. S. 155, when it stated:

> "None the less the verbal niceties were bent to the overmastering purposes of the act to give protection to workers injured on ships. Words we said are flexible."

Before referring to the definition of seamen as evolved by this Court, we think it appropriate to set forth the affidavit of Ernest Anderson submitted in opposition to the motion for summary judgment in the District Court. Prior to the making of the motion, the petitioner had procured depositions from the respondents. In view of the fact that the duties of the respondents were not fully set forth in the depositions made by the respondents, counsel for the respondents found it necessary to state these duties in full in the affidavits which were submitted in opposition to the motion for summary judgment. The affidavits of the respondents are similar and for that reason they were not printed in the Record on Appeal, but by stipulation which the

printed Record contains, the parties had the privilege of referring to any data which was submitted on the motion for summary judgment. The affidavit of the respondent Ernest Anderson is as follows:

"State of New York,
County of New York,

ERNEST ANDERSON, being duly sworn, deposes and says:

I am one of the plaintiffs in the above entitled action. My home is 48 Wadsworth Avenue, Fort Wadsworth, Staten Island, New York City, where I reside. Throughout my period of employment by the defendant, I did not live aboard any vessel and my work day was from 8:00 A. M. in the morning to 5:00 P. M., that is, an eight hour day. During all the time I was employed by the defendant my work was in conjunction with a lighter, which is a vessel not propelled by its own motive power. My work did not require me to sleep, live nor cook aboard the vessel as I was employed only on a eight hour day basis.

My principal occupation was loading cargo onto the lighter and unloading it by means of a gasoline operated winch which was on the lighter. I acted as winchman, making the winch lift and lower the draughts of cargo going on or off the lighter. I acted exactly as the winchman in a longshore gang acts loading and unloading a boat. I work with the other longshoremen for the defendant and they worked with me putting the cargo into different places on the dock of the lighter or in different places on the dock while the lighter was at rest in the harbor.

When I reported to work at 8:00 A. M. of the average day, there were many shore duties to which I had to attend. I had to inspect many packages or pieces of cargo which were on the pier, examine their markings and see if they corresponded to the marks on the papers which had been given to me for loading onto the lighter. After locating the various items and checking them against the papers, I went to the street end of the pier and shaped-up a gang of longshoremen to work with me in the loading and unloading of the lighter: I hired these men ashore and at 5:00 P. M. when we all went home I paid these men off making note of their social security numbers. This also took place ashore. I acted exactly when doing this as a stevedore foreman does. When locating the cargo and checking the marks on the pier, I also was required to examine the condition of the cargo and make written note of any unusual condition or discrepancy. As each piece of cargo went aboard the lighter, I tallied it checking it against the papers I had both as to quantity, quality and description. In these latter operations, I acted precisely the same as a pier checker who checks loading and unloading. At other times I stood on the side of the dock and ran the hook, that is, hooked on and unhooked the cargo hook, which by means of a block and fall and winch, hauled the cargo on and off the pier. In this connection my function was similar to that of a gangwayman of a longshore gang.

All of the former duties directly loaded and unloaded the cargo of the lighter. All of the duties hereinbefore mentioned took up about 95% of my working time.

Once in a great while some water would gather in the bottom of the lighter and the hoist as it operated pumped out this accumulation. On occasion, if asked, I handled the lines handed to me by members of a tug's crew. On rare occasion, may be once a week or once every ten days, the lighter was towed during the day between 8:00 A. M. and 5:00 P. M. The towing time was from one-half hour to one hour and a half, total. The tug boat, which hauled the lighter, was in complete charge of the tow and I had nothing to do with telling the tug's crew where to take the lighter or how. Before I went home at night, I occasionally looked at the lines holding the lighter in place to see that the lighter was properly tied up. These activities and other miscellaneous activities consumed not more than 5% of my working day.

I was not paid on a monthly basis as seamen are. I was paid on a daily basis nor was I required to have any seamens' certificates. I was not on any boat twenty-four hours a day as seamen are. Two-thirds of each average twenty-four hour day I was not on the lighter at all. I was only there as longshoremen are, during the loading and unloading of the lighter. The lighter on which I performed a great deal of my work was called a 'stick lighter' or gasoline hoist lighter. It was not a barge.

The lighter was towed as a rule at night when I was not there. The tug boat crew took complete charge. I had no duties therefore in conjunction with navigation or transporting. My primary duty was not to be aboard the lighter as the affidavit of Harry C. Shanks might suggest.

The lighter was non-self-propelled and had no crew. I did work on and off the lighter. I knew nothing about any Certificate of Enrollment. The mere fact that the vessel aboard which I was employed part of the time was an enrolled vessel did not make me a seaman any more than a customs inspector working aboard a vessel would become a seaman just because the vessel was an enrolled one.

The lighter in conjunction with which I did my work was employed only in the harbor of New York. Deductions were made from my pay for social security benefits and I was also entitled to unemployment insurance benefits, all of which seamen do not get.

I am not a seaman under the recent decisions of the United States Supreme Court, in the cases of *Augustus P. Norton* v. *Warren Company*, decided on March 27, 1944 and *South Chicago* v. *Bassett*, 309 U. S. 251, and therefore I am entitled to the benefits of the Fair Labor and Standards Act. The motion by the other side should be denied.

ERNEST ANDERSON.

Sworn to before me, this
5th day of June, 1944.

HARRIS LEVY,
Notary Public, Bronx County."

In discussing the Federal Longshoremen and Harbor Worker's Act, this Court interpreted the terms "master" and "members of the crew". In general, this Court has referred to "members of the crew" as being "seamen"

and "seamen" as being "members of the crew". The terms are interchangeable.

In *Norton* v. *Warner*, 321 U. S. 565, decided on March 27, 1944, this Court had occasion to define "seamen" and "members of the crew" and to as well consider the duties which distinguished harbor workers from "seamen" and "members of the crew". The opinion is as follows:

> "In the *South Chicago* case, *supra*, the matters which were deemed (p. 260 of 309 U. S. 60 S. Ct. 544, 84 L. Ed. 732) to justify the Commissioner's conclusion that the claimant in that case was not 'master or member of a crew' were that his primary duty was to facilitate the flow of coal to the vessel being fueled from the lighter upon which he worked, that he had no duties while the lighter was in motion, that he slept at home and boarded off ship and that he was called for service each day as wanted and was paid an hourly rate. Some of the same restricted characteristics of employment are to be noted in *DeWald* v. *Baltimore & O. R. Co.*, 4 Cir. 71, F. 2d 810, 811; *Moore Dry Dock Co.* v. *Pillsbury*, 9 Cir. 100 F. 2d 245 and *Henderson* v. *Jones*, 5 Cir., 110 F. 2d 952. On the other hand, in the instant case, just as in the *Loverich* case, the claimant's duties required him to be aboard the barge and to be concerned with its management, care and operation. *He was therefore a seaman and as such, comes within the description of those who, as master or member of a crew, are expressly excluded from the remedy provided by the Compensation Act.*" (Italics ours.)

In *South Chicago* v. *Bassett*, 309 U. S. 251, the Court

at pages 258 and 259 stated:

> "The word 'crew' does not have an absolutely unvarying legal significance. As Mr. Justice Story said in *U. S.* v. *Winn*, 3 Sumn 209, the general sense of the word 'crew' is equivalent to 'ship's company', which would embrace all the officers as well as the common seaman. But it was observed that the laws upon maritime subjects sometimes used the word 'crew' in that general sense, and sometimes in other senses more limited and restricted. It is sometimes used to comprehend the officers and common seaman, excepting the master and sometimes to comprehend the common seaman only, excluding the master and officers * * *. In *The Bound Brook*, 146 Fed. p. 160, 164 *it was said that 'when the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation without reference to the nature of the arrangement under which they are on board'.*" (Italics ours.)

In *Norton* v. *Warner*, (*supra*), this Court quoted the definition of "seamen" as it appeared in the *Buena Ventura*, 243 Fed. 797, 799 as follows:

> "Everyone is entitled to the privilege of a seaman, who like a seaman at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage."

In *South Chicago* v. *Bassett*, 309 U. S. 251, 260, this Court stated:

> "The fact that the certificate of inspection call-

ed for three 'deckhands' and that the captain included the decedent to make up the complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the Court considered as supporting the findings of the Deputy Commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water'. *Schaeffler* v. *Moran Towing Co.*, 68 F. 2d 11, 12."

Counsel for petitioner contend that the determination of the Circuit Court in this case should be reversed on the authority of *Norton* v. *Warner* (*supra*). The contention is untenable. *Norton* v. *Warner* (*supra*) and *South Chicago* v. *Bassett*, (*supra*) supplement each other and leave no doubt as to what this Court decided. In *South Chicago* (*supra*), the injured employee was held to be a harbor worker and not a seaman because his duties were not in aid of navigation. In *Norton* v. *Warner*, (*supra*), the injured was held to be a member of the crew and a seaman because his work was in aid of navigation. The affidavits and depositions of the respondents make it perfectly clear that the respondents' duties concerned the loading and unloading of the various vessels to the extent of 95% of their time employed and

that but 5% of the time they were engaged in miscellaneous work, some of which might be considered in aid of navigation.

An excerpt from *Norton* v. *Warner*, 321 U. S. 565, 567, illustrates the point involved:

> "Rusin was employed as a boatmen on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing * * *. Rusin was employed under a union contract with respondent which stated that all Bargemen assigned to specific barges in active operation were to be paid a monthly salary of $80 and were to be provided with quarters. It also stated that compensation was for all work performed by Bargemen in the operation of his own vessel and that the rates provided were based upon all services and time required to safeguard and operate the barge fleet including necessary pumping, watching or other emergency duties on Sundays and holidays. Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge * * *. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening them or slackening them as necessary, and repairing leaks, pumping out the barge; taking lines from tugs, responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tug boat when being towed; moving the barge at piers by the capstan. * * *. *But he had no duties in connection with the handling of cargo and no shore duties.*" (Italics ours.)

See to the same effect:

Puget Sound v. *Marshal,* 125 Fed. 2d 876 and 879;

Beddo v. *Smoot Sand & Gravel Corp.,* 128 Fed. 2d 608;

DeWald v. *Baltimore & O. R. R. Co.,* 71 Fed. 2d, 811, cited with approval in *South Chicago* v. *Bassett,* 309 U. S. page 260.

POINT II.

The Administrator for the Fair Labor Standards Act intervened in the court below and contended that the respondents were not seamen but harbor workers and entitled to the benefits of the Act.

The Circuit Court of Appeals for the Second and also for the Seventh Circuit have adopted the definition of the term "seamen" as defined by the administrator in his Interpretative Bulletins.

The Administrator for the Fair Labor Standards Act subsequent to the passage of the act was called upon to define and classify those workers who were exempted by the Act. Seamen were exempted and it became necessary for the Administrator to issue Interpretative Bulletins. In January, 1942, the Administrator of the U. S. Department of Labor, Wage and Hour Division, in Interpretative Bulletin No. 11, stated:

"6. Employees on lighters and other barges which are not self-propelled, ordinarily are not within this exemption. Their duties require them to supervise the loading and unloading of the vessel, to act as caretaker of the vessel when loaded, and to handle receipts and inventories of the cargo. The duties performed by these employees, including the handling of the lines used in towing or maneuvering the barge or lighter, are performed primarily as custodians of the cargo, and, therefore, do not bring them within the exemption. However, employees on seagoing barges who are working under seamen ratings required by law, would seem to be employed as seamen."

In July, 1943, in Interpretative Bulletin No. 11, the Administrator, stated, at paragraph 3:

"An employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to his authority * * * service which is rendered primarily as an aid in the operation of such vessel and as a means of transportation, provided he performs no substantial amount of work of a different character."

Section 6 states:

"Barge tenders are non-self-propelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lines, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered seamen within this exemption unless they do a substantial amount of non-exempt work.

Loading and unloading and activities relative thereto will be considered non-exempt work". (Italics ours.)

This Court will note that both Interpretative Bulletins specified that loading and unloading of barges or lighters constitute work which entitled the employee to the benefits of the Act.

Three Circuit Courts of Appeals have recently passed upon appeals involving the exemption of seamen from the Act. In the case at bar Judge Clark, among other things, said:

> "But the applicable interpretation by the Wage and Hour Administrator, to which we must give considerable weight in arriving at a proper definition of the scope of the exemption now before us, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136, cf. *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 2 Circ., March 12, 1945, excludes therefrom 'barge tenders on non-self-propelled barges' who 'do a substantial amount of non-exempt work' such as 'loading and unloading and activities relative thereto.' Interpretative Bulletin No. 11—Seamen Exemption, July, 1943, par. 6. The word 'substantial' denotes a comparison based on a ratio of nautical to longshore duties. Hence guided by the Administrator's interpretation, the showing by affidavit that 95 per cent of plaintiffs' work is 'non-exempt' precludes summary judgments against the plaintiffs."

In *Walling* v. *Great Lakes Dredge & Dock Company*, decided by the Circuit Court of Appeals for the Seventh Circuit, on April 24, 1945, the facts were similar to the facts involved in the case at bar. The question there

was whether persons working on vessels which had machinery for dredging were to be considered seamen or harbor workers. The Circuit Court of Appeals held that they were harbor workers and not seamen. The respondents were employed upon lighters which had hoisting machinery for loading and unloading of freight. In the *Walling* case there was a similar apparatus for dredging the beds of navigable waters. In neither instance could it logicaliy be claimed that the work done was in aid of navigation. A portion of the opinion in *Walling* v. *Great Lakes Dredge & Dock Company* is as follows:

> "An administrative interpretation by the Administrator for the guidance of the administration of the Act provides:
>
> > 'An employee will ordinarily be regarded as employed as a seaman if he performs as master or subject to authority * * * of the master * * * service which is rendered primarily as an aid in the operation of such vessel as a means of transportation * * *'. The exemption does not extend to employees working aboard vessels whose service is not rendered primarily as an aid in the operation of the vessel, as a means of transportation. Thus employees of floating equipment * * * 'and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other material are not employed as seamen.' This interpretation was issued July, 1939 and amended in 1943.
>
> In the hearing before the Joint Congressional Committees, a legislative representative of the Na-

> tional Maritime Union appeared and discussed the status of seamen. He pointed out that the Merchant Marine Act of 1936 provided that the Maritime Commissions have jurisdiction of wage conditions."

The Circuit Court of Appeals for the Fifth Circuit in *Gale* v. *Union Bag & Paper Corporation,* 116 Fed. 2d 27 had occasion to review the claims for overtime pay of persons working on vessels. The Circuit Court of Appeals in that case found that the work performed by the claimants was in aid of navigation and did not concern the loading and unloading of the vessels. Under the circumstances, the Court held that the claimants were seamen and not entitled to the benefits of the Act.

There is no conflict among the various Circuit Courts of Appeals as to the rule of the law established in *Norton* v. *Warner* and *South Chicago* v. *Bassett* (*supra*).

We adopt for our purposes the argument advanced by the Administrator when he intervened in the Court below. On pages 5, 6, 9 and 10 of the Administrator's brief, he stated:

> "In interpreting Section 13 (a) (3) for the guidance of persons affected, the Administrator of the Wage and Hour Division has, for the purposes of that section, defined a 'seaman' as one who performs aboard a vessel 'service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. * * * Loading and unloading and activities relative thereto will be considered non-exempt work.' See Interpretative Bulletin No. 11, July, 1939, revised July, 1943, pars. 3, 6. Unquestionably, plaintiffs are not 'seamen'

under this definition. They are not naturally and primarily on board the lighters to aid their navigation. Ninety-five per cent of their work is in loading and unloading other vessels; only on rare occasions are they even on board the lighter while it is in tow and on those occasions their duties are trivial.

We submit that the Administrator's interpretation, as applied to this case, is clearly valid and should be followed by the Court. The distinction which he draws between workers whose primary duties relate to the operation of a vessel as a means of transporting persons or goods, on the one hand, and workers chiefly engaged in loading and unloading goods, on the other, follows a well established line of demarcation."

"The critical question, therefore, is one of fact. Is the work of the employee directed to the navigation of a vessel or is it the work of any longshoreman coupled with a few casual but unimportant tasks such as handling lines and pumping bilge water? In the *South Chicago* case the employee's tasks related to navigation were few and 'additional' (p. 255); therefore, he was held not to be a 'seaman'.

The instant case falls under the *South Chicago* decision. The nature of the plaintiffs' work clearly demonstrates that as a matter of fact they are not 'seaman' in any normal meaning of the word. They are not 'naturally and primarily on board' the lighters 'to aid in their navigation' (*South Chicago Co.* v. *Bassett*, *supra*, p. 259). Their work ends at the beginning of the journey or begins at the end of the journey. They have no seaman's papers or nautical training; nor have they any

other specialized training related to the navigation of vessels. True, the floating contrivance upon which they work is considered a vessel and transports the cargo over the short distance intervening between ship and shore. But they are rarely on board during this maneuver and even on the infrequent occasions when they are on board, they have no responsibilities or duties in any way related to the movement except the insignificant task of handling the lines. Although they are charged with the detection of leaks and the pumping of bilge water, their real work begins when the lighter is secured either to the ship or to the dock. The work for which these men are hired and which they chiefly perform is to load and unload cargo; it is not to voyage but to load for the voyage or to unload after the voyage. They perform the combined tasks of foreman of a longshore gang and of pier checker; they hire the longshoremen and check and inspect the cargo. They stand on the side of a dock, direct the work of the longshoremen, connect the cargo to a block and fall and operate the winch hauling the cargo on and off the pier. They supervise the rearrangement of the cargo on the dock or in the lighter. If this work were done while the vessels being loaded were tied to a pier, no one would suggest that the longshoremen should be classified as 'seamen' for the purposes of the Fair Labor Standards Act. It should not alter the case that their winch is fastened to a floating platform and the erstwhile foreman has been dignified by the title 'captain'. Ninety-five per cent of their work remains the same. Clearly, under the *South Chicago* case these trivial 'additional duties' are not enough to convert them into seamen."

POINT III.

Congress did not intend to exclude harbor workers from the benefits of the Fair Labor Standards Act.

Congress exempted seamen from the benefits of the Act. What duties did Congress believe the seamen performed which made it impractical for them to receive the benefits of the Act? It is apparent that Congress thought a seaman is one who has a permanent attachment to his vessel; one who is obliged under the articles which he signs to be employed on a vessel 24 hours a day, seven days a week; one who eats and sleeps aboard the vessel and whose duties, in the main, concerned the navigation of the vessel. Obviously such a person could not very well fit the description of a person who worked 40 hours a week and who was entitled to overtime benefits provided by the Act.

We again adopt the language used by the Administrator in his brief on pages 15 to 24 as our own.

> "The legislative history of Section 13 (a) (3) shows that Congress did not intend to exempt miscellaneous harbor workers such as cargo workers from the coverage of the Act.
>
> The original Black-Connery bill made no exception for seamen. At the Joint Hearings before the Senate and House Committees on Labor, however, it was pointed out that Congress had already provided legislation regulating the wages or hours of various special groups of workers. Evidently, this convinced the Committee that the introduction of new legislation into these already occupied fields

would cause hopeless confusion; for the Committee proposed various amendments, which were later adopted, excluding from coverage of the Act, each group of workers whose wages or hours was already covered by special legislation. The Committee's policy was to mold the exemptions in such a way as to avoid conflicting regulations; so far as appears it had no intention of going farther and exempting employees not belonging to the group which theretofore received adequate protection. Thus, Senator Black explained on the floor (81 Cong. Rec. 7875):

Mr. President, it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such a way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.

The amendment of the Senator from New Jersey would apply the same principles to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently. * * * Speaking for myself I do not object to the amendment.

The legislative history shows with particularity that the Section 13 (a) (3) exemption was developed in this manner. Prior to consideration of the Fair Labor Standards Act, Congress had enacted the Merchant Marine Act of 1936, Section 301 (a) of which provided:

SEC. 301 (a). The Commission is authorized and directed to investigate the employment and wage conditions in oceangoing shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under Titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. * * *

This provision was hailed as basic legislation protecting the wages, hours, and working conditions of seamen. The original Black-Connery bill, nevertheless, was drafted in such a way as to cover all maritime workers engaged in commerce, thus creating the threat of conflict between the regulation of the wages and hours of seamen under the Fair Labor Standards Act and their regulation by the Maritime Commission. When the Black-Connery bill was in committee, therefore, the two chief labor organizations representing seamen called the Committees attention to the Merchant Marine Act and expressed a strong desire, that the bill should be amended to exempt 'seamen' and avoid any interference with the prior legislation. Thus, the Sailors Union of the Pacific wrote (Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 1216, 1217):

Further attention is called to title III, section 301, of the Merchant Marine Act of 1936, wherein the Maritime Marine Act of 1936, where-

in the Maritime Commission is empowered to perform, for subsidized vessels of the United States Merchant Marine, duties similar to those assigned to the proposed board under H. R. 7200 and S. 2475. The section referred to reads in part:

• • • • • • • • •

Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation.

Therefore, I ask on behalf of the Sailors Union of the Pacific, that the bill be so written as to exclude the seamen from the operation of the provisions of the bill.

Ralph Emerson, legislative representative of the National Maritime Union, also asked that 'seamen' be exempted from the proposed legislation because their wages, hours, and working conditions were already closely regulated by law and were subject to further regulation by the Maritime Commission. He argued that it would be unwise and productive of confusion to introduce new and general legislation into the field, and stated that his union would prefer to continue under the jurisdiction of the Maritime Commission (Id. at 546, 547, 548, 549):

• • • we feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes

of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the Government machinery now set up to handle these problems.

• • • • • • • •

As this newly formed Maritime Commission has jurisdiction at present over seamen in regard to wages, working conditions, and manning scale on subsidized merchant ships, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any legislation that would be conflicting.

• • • • • • • •

• • • We still feel, as regards the seamen, that they are working under substandard labor conditions, because our wages certainly do not compare with the average mechanic or shore workers, up to now.

• • • • • • • •

What we would like is an interpretation of the bill which would provide a protective clause for the seamen. If it is going to be the interpretation of the bill that transportation workers in general come under the jurisdiction of this Board then we would like to know it. I have never been able to find out yet as to whether the Board is going to have jurisdiction over us.

The Chairman (Senator Black): Do you think it would be unwise to have two boards with jurisdiction over the same group?

Mr. Emerson: Yes, sir.

The Chairman: Which would you prefer?

Mr. Emerson: We would prefer the Maritime Commission.

The Chairman: You would prefer the Maritime Commission?

Mr. Emerson: Yes, sir.

• • • • • • • •

The Chairman: Thank you very much. I might say, so far as I am individually concerned, I believe it would be improper to have a conflict of jurisdiction between two boards. I would not want to have divided jurisdiction. I would want one that had complete authority. I do not believe the bill, as written, covers the seamen, although there may be a question about it.

The Section 13 (a) (3) exemption grew directly from these requests. When the Committee reported the bill, it offered an amendment to exempt 'seamen'. S. 2475, S. Rept. 884, 75th Cong., 1st sess. The amendment was accepted by the Senate. Later Senator Black, who as Chairman of the Committee, had said during Mr. Emerson's testimony that he believed 'it would be improper to have a conflict of jurisdiction between two boards,' stated on the floor in explanation of the amendment (81 Cong. Rec. 7875):

• • • it was the policy of the committee in cases where regulation of hours and wages are given to other governmental agencies to write

the bill in such a way as not to conflict with such regulation. That action was taken with reference to maritime workers.

It is true, of course, that the interpretation which the Administrator has put upon Section 13 (a) (3) does not confine the exemption to workers operating vessels receiving differential subsidies and therefore coming under the jurisdiction of the Maritime Commission. It would be unfair and impracticable to grant the exemption to vessels receiving the subsidy and to deny it to competing vessels which did not. Furthermore, other considerations which we shall mention presently also entered into the determination that 'seamen' should be exempt. Our point is that since the main purpose was to avoid conflict between two agencies by exempting workers subject to the Maritime Commission, the extent of the Maritime Commission's authority must be given great weight in defining the class of workers which is to be exempt. The line drawn by the Administrator between seafaring men whose principal duties are to render 'service aboard a vessel * * * primarily as an aid in the operation of such vessel as a means of transportation,' on the one hand, and miscellaneous harbor workers such as lighter workers, longshoremen, and dredgers on the other, who although they may work on water, have nothing to do with navigation, admirably effectuates this main object of Congress while observing a well recognized line of demarcation. There is not the slightest reason for extending the exemption beyond the general class of navigation workers who man maritime vessels and who for years have been treated as a special group in legislation affecting

their employment relations. Lighter workers loading and unloading cargo, as well as dredge workers, longshoremen, and other harbor workers, are not in the class of navigation workers. They are not protected by other legislation. It would be a travesty to expand the exemption so far beyond the intention of Congress as to deny to them this Act's protection.

The other persuasive reason for the 'seaman's' exemption was the impracticability of regulating the wages and hours of 'seamen' in the manner contemplated by the Fair Labor Standards Act. Most true seamen, i. e., workers navigating transport vessels, must be furnished food and quarters free of charge (46 U. S. C. secs. 80, 564, 713), and for that reason they were opposed to having applied to them general legislation which permitted an employer to include in wages the cost of facilities furnished to his employees (Section 3 (m), Joint Hearings, pp. 548, 549). There is no difficulty, however, in applying the scheme of the Act to the minimum wage paid to plaintiffs. They do not live on board the lighters. They receive an hourly wage, and meals are not supplied by the employer (R., 39, 60). In short, there is no reason why the Act should not apply.

Even more significant is the distinction between seamen and cargo workers such as plaintiffs in respect to hours of work. The seaman's contract binds him to the vessel for the whole voyage and under all conditions and perils of the sea. During the voyage these men are on board at all times and are constantly subject to call in the case of an emergency. 'Under the best of conditions in the maritime industry as affecting seamen it is

impossible at the present time for us to work less than 56 hours per week' (Joint Hearings, *supra*, p. 548). Similar requirements exist as to workers who are continuously engaged in navigating barges and other vessels plying the inland waterways. The objective of the Fair Labor Standards Act to limit the workweek to 40 hours could not possibly have reached its mark in any of these stiuations. *Cf. Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. 'To restrict their employment to a week would greatly interfere with the operation of such means of transportation' (*Gale* v. *Union Bag & Paper Corp.*, *supra*, p. 28). This circumstance alone was a strong reason for exempting seamen from the general legislation. See *Helena-Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616, 619 (C. C. A. 8).

This reason, however, does not apply to a worker engaged in facilitating the loading and discharging of cargo by means of a water-borne winch. His main task is not that of a seaman. It is merely the performance of a duty 'that formerly was ordinarily done by the crew, not upon the high seas, but at the ship's destination, minus the perils of the sea. He does not undergo the hardships and dangers, nor does he surrender the personal rights and liberties that a seaman does in binding himself to the vessel as a member of its crew * * *' *Flanagan* v. *Carken*, 11 S. W. (2d) 392, 394 (Tex. Civ. App.). Unlike seamen, who are paid monthly, plaintiffs since at least the year 1938 have been paid an hourly wage and have received time and a half their regular rate for all hours over eight per day. Since they work six days each week, the sole issue is whether they

should receive premium pay for time over 40 hours rather than for time over their current schedule of 48 hours. Thus, even before the Fair Labor Standards Act, maximum hour regulations of the precise kind as those embodied in the Act were voluntarily applied to the work of the plaintiffs. Surely, Congress could not have anticipated any regulatory difficulties in this situation and could not have intended the exemptive amendment designed to avoid these difficulties to apply to these men."

POINT IV.

The decision of the Circuit Court of Appeals was not a final adjudication. It reversed the District Court's finding that the respondents were seamen.

On the motion of the petitioner, the District Court held that the respondents were seamen and granted summary judgment in favor of the petitioner. No trial of the issues was had.

The Circuit Court's decision reversed the finding of the District Court that the respondents were seamen and remanded the case for trial. The petitioner is not deprived of a trial or prevented from offering proof pertinent to the issues. The Circuit Court's decision, aside from reversing the District Court's finding, restates the law as expressed by this Court.

The District Court was not justified on the papers submitted to it in holding as a matter of law that the respondents were seamen. We believe that the application for a writ is premature. A trial should first be had

and thereafter if any of the parties feel aggrieved, the complete record can be reviewed and the law applied to the proven facts. In the case of *South Chicago* v. *Bassett*, 309 U. S. page 251, the Court at page 258 stated:

> "Petitioners urge that the question whether the decedent was a member of the crew was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of the crew as distinguished from a longshoreman or a laborer at work upon the vessel. We are unable so to conclude."

In the case of *Puget Sound Freight Line* v. *Marshal*, 125 Fed. Report 2d, the Court at page 878 stated:

> "There has not yet been formulated a precise statement from which it can at once be determined just when an employee is a member of the crew and when he is a harbor worker; and therefore his classification must be determined by the circumstances of his own individual case * * * because there is no conflict in the evidence appellants seek to have the class status settled as a matter of law."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ISIDOR ENSELMAN,

Counsel for Respondents.